November 26, 1997

Office of the Secretary
Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

RE: Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities
FCC 97-296, MM Docket No. 97-182

Gentlemen:

Enclosed is an original and 9 copies of the Reply Comments of Jefferson County, State of Colorado for filing in the above referenced matter.

Very truly yours,

Joyce Bailey

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of

Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities	)	MM Docket No. 97-182

REPLY COMMENTS OF:

The County of Jefferson, State of Colorado
100 Jefferson County Parkway
Golden, Colorado 80419

The County of Jefferson, State of Colorado files these Reply Comments by and through the Jefferson County Attorney's Office, by Claire B. Levy, Assistant County Attorney.

These comments will reply to the comments submitted by the National Association of Broadcasters and the Association for Maximum Service Television (hereinafter referred to collectively as "the NAB"), and will also reply to the specific scenario in Jefferson County, Colorado that is described by McGraw Hill Broadcasting Company in its comments.

SUMMARY STATEMENT

The NAB bases the need for the preemption rule on the rapid role-out schedule for Digital Television ("DTV") and anticipated time delays. The FCC must keep in mind all of the interests that are affected by the proposed rule. Just about every industry and interest group from manufacturers to agricultural concerns to homeowner organizations perceive there to be obstacles

from local governments to accomplishing their goals. Each of them, no doubt, would like a federal agency to intervene on its behalf if one were available for its specific interest. That approach to resolving conflicting interests overlooks the fact that local governments are charged with using their land use authority to further the health, safety and welfare of all of the inhabitants of their communities. Local governments are also primarily responsible for the economic health of their region and for preserving and stabilizing property values. Those responsibilities necessarily involve the difficult task of balancing competing interests for the benefit of the common good. Preempting local control for the broadcast industry unnecessarily puts their interests ahead of all the other competing interests in a community.

Congress acted in 1996 to reform telecommunications law to create more competition and to eliminate barriers to new entrants to the market. Congress also acted to make more spectrum available for public use. The Telecommunications Act of 1996, by itself, does not identify a compelling federal need to override the competing interests that will be displaced if local land use authority is preempted. Creating high paying manufacturing jobs is an important national interest. Locating and constructing a new manufacturing facility has important impacts on transportation infrastructure, land use patterns, property values, air and water quality, to name a few. As important as jobs are to a community, a new plant must still comply with the master plan, zoning regulations and building codes. Other segments of the economy are able to function within the constraints of local land use authority. There is nothing about providing DTV services that is any more compelling than any other economic interest.

It is important for the FCC to understand the range of issues that is effectively preempted by the proposed rule. Although portrayed as being limited and as preserving "traditional" land use authority, in fact the proposed rule strikes at the most important component of land use authority. Most local governments are required to formulate a master plan for development, which serves as a basis for zoning and other land use decisions. The master plan represents the community's vision for how it wishes to grow and develop. A master plan is typically aimed at preserving property values, assuring compatibility of adjacent uses, providing adequate housing and employment opportunities, requiring infrastructure to be provided coincident with development, and protecting natural resources and natural amenities in an area such as scenic corridors, wildlife habitat, and air quality. The zoning plan specifies uses allowed by right and uses allowed only by special review in the various zone districts in an effort to make development compatible with existing uses and with the master plan. In the case of Jefferson County, Colorado, the master plan is used when a change of zone district is proposed to determine whether the proposed use is appropriate for the area.

When a new broadcast tower or any other new use is proposed in an area that is not currently zoned for that use, the applicant must demonstrate that the location is appropriate given the planned development of that area. A new broadcast tower in an area planned for residential development or even commercial development would be devastating. The ability to prevent that type of intrusion is the heart of local land use authority.

Even less drastic scenarios illustrate the violence that preemption can do to local

communities. If we assume that most broadcasters will attempt to locate new DTV facilities in fairly close proximity to their existing facilities, that does not assure that local land use interests have already been or will be met. In the case of Lookout Mountain in Jefferson County, the visibility and prominence of a tower and its compatibility varies greatly depending on which face of the mountain the tower is located on and where in relation to existing structures the facility is located. The policies reflected in the master plan, though nominally related to aesthetics, are intended to steer broadcast towers to locations where they will have less impact on the views from and to Lookout Mountain, to where they will have less impact on the tourist attractions on the mountain (Buffalo Bill's grave, the Jefferson County Nature Center, and the historic Boetcher Mansion are located on Lookout Mountain), and to where they will have the least impact on the existing residents in the area. Jefferson County would not be able to have any input into location under the proposed rule. Before a rule is enacted with this far reaching impact, that gives one industry a preference not accorded to any other industry, it ought to be clear that there is a compelling national need and consensus for this result.

REPLY TO SPECIFIC NAB COMMENTS

1. The NAB's Preliminary Statement represents the proposed rule as being principally concerned with procedural constraints rather than substantive limitations, and characterizes the substantive restrictions as those already regulated by federal standards. This misrepresents the scope and effect of the proposed rule. The procedural limitations represented by the time limits for processing will also affect substantive issues because it will be simply impossible to protect

effectively the health, safety, and welfare interests in various land use and building codes within the proposed time frames. More importantly, this statement wholly ignores the portion of the proposed rule that preempts "[a]ny state or local land use, building, or similar law, rule or regulation that impairs the ability of federally authorized radio or television operators to place, construct or modify broadcast transmission facilities" unless related to a health or safety objective other than environmental, interference and marking requirements. Translated into plain English, this preempts everything except the building codes. This language preempts all regulations by which local land use authority is implemented. It preempts all regulation aimed at ensuring compatibility with surrounding land uses or protecting visual resources.

The Preliminary Statement refers to the procedures for review as a means to encourage broadcasters and local authorities to work together. In fact, it will have the opposite effect. With a forum for dispute resolution that is perceived to be favorable to the interests of the industry, broadcasters will more readily resort to brinksmanship and to an adversary posture than if they face the expense and scrutiny of a neutral judicial system under legal principles that are universally applicable.

Thus, although the Preliminary Statement casts the proposed rule in a harmless light, it in fact devastates completely local interests. No sufficiently compelling countervailing interest has been identified to upset the division between local and federal regulatory that has served the broadcast industry since its inception.

2. The NAB comments suggest that the time limits are a "reasonable period " of time (p. 4),

and represent that delay is a "common tactic" utilized by local officials to dodge the responsibility to make decisions (p.4, n. 4). The time periods proposed are arbitrary and bear no relationship to the type of land use permit that may be required, to time limits imposed by state law for those processes, or to the complexity of the action being requested. For example, the proposed rule creates a thirty day period for requests to relocate an existing facility, consolidate facilities on a new or existing tower (regardless of the location of the new tower), or increase the height of an existing tower. This rule includes situations where an entirely new tower at a new location is requested. This may legally require rezoning, which includes statutory notice requirements. An increase in height may create different set back needs in order to accommodate ice-fall or potential debris from tower failure. The structural integrity of a new tower must be considered. These circumstances cannot be examined effectively or legally in a thirty day period. The proposed time limitations are not an attempt to impose a reasonable period of time. They are an effort to eliminate the possibility of meaningful local review.

The only stated support for this draconian rule is the unsubstantiated allegation that delay is a "common tactic." In fact, most local governments are already governed by time periods specified in state statutes. All other development activities and uses that exist are able to live within the existing processes. Imposing the proposed time limits or any other time limits for the broadcast industry would create one of several scenarios: the local government will be forced to deny the requested authority rather than be forced to grant approval without having undertaken the necessary review; the local government will be forced to reallocate its staffing and other

resources to the broadcast industry notwithstanding other locally established priorities and notwithstanding the impact on all other applicants and their financial interests; or the request will be deemed approved under the statute and public safety and other interests will be forsaken. None of these scenarios is good. Existing processes should be allowed to work.

The NAB again minimizes and wholly misrepresents the scope of the proposed rule on pages 5 and 6 of their comments. The comments state that "'traditional' land use and zoning authority is reserved to state and local governments . . ." As has been demonstrated above, nothing remains of traditional land use authority. Since land use regulations were first considered by the United States Supreme Court in City of Euclid v. Ambler Realty Co, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed.303, courts have recognized that ensuring compatibility of adjacent developments is an appropriate and essential goal of zoning. Aesthetic interests are well recognized as a legitimate purpose of land use regulation. The proposed rule leaves intact only whatever narrow health and safety interests remain after health effects of radio frequency emissions, interference effects and lighting and marking regulations have been eliminated.

The proposed rule is not limited to those areas that the federal government adequately addresses or to those areas in which local regulation is inconsistent with federal regulation. It eliminates authority in areas that the federal government has no interest in and no competence to address.

3. The request for preemption regarding exposure to RF emissions asks local governments to rely on the certifications made to the FCC. Assuming local governments were willing to abide

by a national standard for RF emissions, RF emitters should still be required to submit to local governments the data that demonstrates compliance with those levels. If the facilities have been tested and are in compliance with RF requirements at the relevant locations, that data should be available.

The NAB seeks protection from consultation fees and environmental assessment studies. The facilities broadcast at many thousands of watts of power, and the NAB is requesting to locate them wherever they please. The broadcasting industry is a multi-million dollar industry, utilizing spectrum that is part of the public domain, which purports to serve the community in which it is licensed. The cost of assuring the local community that the facility is safe does not seem to be unreasonable, particularly when juxtaposed with the benefit derived by the broadcast company from its license.

4. The request for preemption of aesthetic regulations described on page 14 of the NAB comments erects a straw man for purposes of this argument. It presumes that aesthetic regulations will seek to render the facilities invisible. Regulations that address aesthetic interests are more complex than is portrayed by the NAB. Aesthetic interests can include protecting scenic views, eliminating unnecessary lighting, requiring guyed towers instead of freestanding towers when feasible, avoiding locations near residential areas, and many other interests. These interests may not allow facilities to be located at the cheapest most convenient place. They will rarely thwart local approval altogether since it is rare that only one site provides a suitable location from which to broadcast.

The NAB petition would preempt the entire gamut of land use objectives other than narrow health and safety interests. These include not just the relatively subjective aesthetic interests typically associated with the appearance of the tower itself, but community character and compatibility interests that are the heart of land use regulations. The NAB suggests that the factors considered under NEPA for which an environmental assessment may be required are an adequate substitute for local land use regulation. That is wrong. The rationale in the NAB petition carried to its logical conclusion eliminates the need for local land use regulation of any type of development. NEPA would become the national land use code.

5. In commenting on the time period requested, it becomes clear that the entire justification for upsetting the current well settled local control over land use is the construction schedule in the Fifth Report and Order. Speedy approval drives the process. In that case, any local action that interferes with speedy approval must be eliminated, leaving no basis for allowing local action at all. This would clearly be unreasonable. Construction schedules are an inadequate reason to allow huge transmission facilities to be thrown up with no opportunity for adequate review.

The NAB has not demonstrated with any specific facts that local regulations have or will thwart their ability to comply with the Fifth Report and Order. The first proposal by broadcasters for a tower to accommodate their DTV antennae is not expected to be made in Jefferson County until sometime in 1998, two years after the Telecommunications Act of 1996 became law and many more years after it became apparent that DTV would be mandated. If compliance with the

roll-out schedule is difficult, it is a self-inflicted hardship that should not be eased at the expense of the residents of the communities to be served.

6. The NAB sites no specific siting issues or delays related to approval of DTV facilities that justify the proposed rule. The NAB relies instead on comments in proceedings for entirely different facilities. The NAB concludes its comments with the unsubstantiated and conclusory statements that states and local governments "often" impose regulatory requirements that are inconsistent with federal requirements; that overlap with issues regulated by the federal government; and that create delays and moratoria. Surely an occurrence that is as often as is represented could be documented with at least one relevant citation. Instead, the NAB asks the FCC to presume conclusively that the same conditions encountered by the personal wireless service facilities industry and for satellite receive-only equipment will apply to broadcasters. There is no basis from which to conclude the response to different types of facilities with different siting needs will be the same.

REPLY TO MCGRAW-HILL COMMENTS

McGraw-Hill owns a television station that broadcasts to the Denver metropolitan market from Lookout Mountain in Jefferson County. This is the 18th largest market in the country, and demographically is relatively affluent. McGraw-Hill requests preemption because it would be less expensive to continue to use the site from which they have been broadcasting since the 1950's when very few people lived in the surrounding area. They would like to be spared the expense of relocating to a new site that complies with local zoning requirements. They would

also like to be spared having to go through a process when the outcome is not guaranteed. There appear to be only two bases for requesting preemption: complying with land use regulations is expensive and it is possible they will not obtain approval.

Sand and gravel operations must complete expensive environmental studies prior to receiving zoning approval; major commercial facilities must complete studies and build infrastructure to serve their developments; new residential developments must build infrastructure and provide park and school facilities to serve the development. Outside of local land use requirements there are a host of federal requirements that are often expensive, such as pollution control devices and wetlands preservation requirements. All development carries an expense. These expenses are necessary to serve the common good and to mitigate the adverse impacts of the development. This society has moved beyond the stage it was in a century ago when environmental resources were appropriated without charge and when community interests were overridden by industrial interest.

If approved a new tower will enable the six broadcasters currently broadcasting from Lookout Mountain at locations intermingled with residences and major tourist attractions to relocate to a single facility at a location more appropriate in light of existing development. It will clean up the visual blight on a major mountain west of Denver. The expense of a new tower will eliminate an unacceptable situation.

McGraw-Hill represents correctly that there is no assurance that a new tower will be approved. The new tower must go through the quasi-judicial zoning process, which includes an

informal community meeting, a hearing in front of the Planning Commission, and a hearing in front of the Board of County Commissioners. The proposal will be evaluated based on whether it conforms to the Central Mountains Community Plan and the Telecommunications Land Use Plan, and on whether it is compatible with existing and allowable uses in the surrounding area. Conformance with the master plan and compatibility with surrounding uses are accepted land use approval criteria in Colorado. The referenced Plans are readily available to McGraw-Hill. Thus, although approval cannot be assured, McGraw-Hill faces no more uncertainty than any other rezoning proposal.

The possibility that a new tower may not be approved in time to meet the November, 1999 roll-out date and the expense of consolidating multiple antennae onto a single tower is not a sufficient justification to preempt the zoning and community plans that the residents of Jefferson County have adopted.

Respectfully submitted this 28th day of November, 1997 by:

THE BOARD OF COUNTY COMMISSIONERS
JEFFERSON COUNTY, COLORADO

John P. Stone, Chairman

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